SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF ALBERT EDWARD BEST, DECEASED, PETITIONER,

vs.

DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 25, 1933

[fols. a & 1] [Captions omitted]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A LAW TERM

At Law

Number 77860

NOAH BEST, Administrator of the Estate of Albert Edward Best, Deceased, Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Body Corporate for Municipal Purposes, Defendant

DECLARATION—Filed March 12, 1930

The plaintiff, Noah Best, to whom letters of administration have been issued by the Supreme Court of the District [fol. 2] of Columbia, holding a Probate Court, upon the estate of Albert Edward Best, deceased, Administration Number 39,247, sues the defendant, District of Columbia, a body corporate for municipal purposes, created and existing under the Laws of the United States, for that heretofore, to wit, on the 28th day of April, A. D. 1929, by an injury done and happened within the limits of the District of Columbia, the death of the said Albert Edward Best was caused by the wrongful act, neglect, and default of the said defendant, which said wrongful act, neglect and default was such as would, if the death of the said Albert Edward Best had not ensued entitled him to maintain an action against the defendant.

And that at the time of the happening of the said injury hereinafter more particularly set out the defendant had municipal control and jurisdiction over and was charged with the duty of maintaining in a reasonably safe condition a certain wharf located at the foot of Ninth Street, Southwest, in the City of Washington, District of Columbia and used by said defendant as a Sand Wharf; that the said wharf was adjacent to a public street frequented by many people and children.

That it then and there became and was the duty of the said defendant to properly guard the approaches

to the said wharf, to maintain safe, secure and satisfactory guard-, bars or barriers in order that the said wharf and its approaches might not be peculiarly alluring and attractive to young children of tender years; and to maintain and keep a safe and proper lookout so that children of tender years would not be allured or invited or enticed to come around, near and on to the said wharf and to play on or about the said wharf; and not to permit the said wharf to remain unprotected or unguarded and to keep and to have the said wharf in a reasonably safe and proper condition with due regard to the safety of plaintiff's intestate and not unnecessarily and unreasonably expose him to danger and to maintain and care for and preserve the said wharf so that the said wharf, the planks and boards thereon, would not be dangerous and unsafe and that a reasonably safe and proper condition might be maintained.

And the plaintiff avers that the defendant in violation of its duties in the premises and in disregard of the same negli-[fol. 3] gently and carelessly failed to properly guard the approaches to the said wharf in that there was no proper gate, barrier, bar, guard or fence; and carelessly and negligently failed to maintain safe, secure, and satisfactory gates, bars, barriers, guards or fences; and failed and neglected to maintain and to keep a safe and proper lookout for children of tender years playing in, on and about said wharf so as not to unreasonably and unnecessarily expose such children to danger; and negligently and carelessly suffered and permitted the said wharf, planks and boards thereof, to be and remain in a dangerous and unsafe condition leaving large holes in said wharf, planks and boards unguarded and unprotected; that said defendant had full knowledge that the said wharf was dangerous per se yet, notwithstanding, the defendant negligently and carelessly for a long period of time allowed and permitted said wharf, the planks and boards thereof, to remain in the condition aforesaid and made no effort to protect or guard children of tender years from the dangerous condition thereof.

And the plaintiff's intestate being an inhabitant of the City of Washington, District of Columbia, and living with his parents therein in the vicinity of said dangerous wharf and being a child of tender years, to wit, the age of five years, and incapable of exercising ordinary care and pru-

dence, and without discretion or judgment in matters relating to a dangerous wharf, was on, to wit, the 28th day of April A. D. 1929, in company with other young children attracted and allured to the said wharf and did on the said date with other young children visit said wharf and while plaintiff's intestate was playing at, about and on the said wharf, which said defendant had permitted to become and remain in such condition as aforesaid, without any negligence or want of due and proper care on the part of plaintiff's intestate on, to wit, the 28th day of April, A. D. 1929, fell through one of the holes in said wharf, so unprotected and unguarded and without warning, into the water beneath said wharf and was drowned.

And the plaintiff's intestate whose death was caused by drowning, left surviving him a father, mother and four brothers and by reason of the premises and the statute in [fol. 4] such case made and provided an action for damages has accrued to the plaintiff in the sum of Ten Thousand Dollars ($10,000).

Wherefore he claims damages in the sum of Ten Thousand Dollars ($10,000) besides costs.

James A. O'Shea, John H. Burnett, Alfred Goldstein, Attorneys for Plaintiff.

Ordered filed without prepayment of costs.

F. L. Siddons, Justice.

Mch. 12/30.

In Supreme Court of District of Columbia

Plea—Filed April 7, 1930

* * * * * * *

The defendant, the District of Columbia, for a plea to the declaration filed herein, admits that it is a municipal corporation; but denies that the death of Albert Edward Best was caused by its wrongful act, neglect or default.

Defendant admits that on the 28th day of April, 1929, it exercised control and jurisdiction over a certain wharf located at the foot of Ninth Street, S. W., in the District of Columbia, which was used as a sand wharf. It denies, however, that the same was used exclusively for municipal purposes but avers that it was used entirely for governmental purposes, to wit, for the storage of sand and gravel

used in the construction of sewers and school buildings and of walls, walks and playgrounds appurtenant to public schools. It admits said wharf was adjacent to a public thoroughfare but denies that it was frequented by many people and children.

The defendant denies that it was charged with the duty of guarding, maintaining, supervising and protecting said wharf or its approaches as alleged in the declaration.

Defendant denies any violation of its duties as alleged in the declaration and denies that in disregard of the same that it negligently and carelessly failed to properly guard the approaches to the said wharf or maintain the same with reference to the gate, barrier, bar or fence, and denies that it [fol. 5] failed and neglected to maintain and keep a safe and proper gate, barrier, bar, guard or fence to or around said wharf. Defendant denies that it permitted the said wharf, planks and boards thereof to be and remain in a dangerous and unsafe condition with regard to the purpose for which the said wharf was used and maintained, and defendant denies that it had any notice as alleged in the declaration of the alleged condition of the said wharf and denies that no effort was made to protect or guard children of tender years from the dangerous condition thereof. Defendant avers that the said wharf and the approaches thereto were located on private property and that a board fence was maintained around said wharf and enclosure with two openings in said fence to permit the ingress and egress to said wharf for vehicles and persons who were employed on and about the said wharf. There was maintained a bar or gate at said openings at times when trucks were not passing from the public street to said wharf. That the said wharf, its approaches and enclosure were private and that persons without authority coming within the enclosure or on the wharf proper did so without authority in law and were trespassers. Defendant further avers that children of tender years were advised they were not permitted to play on and about said wharf. Defendant denies that said wharf and its approaches were peculiarly alluring and attractive to children of tender years.

Defendant avers that if the said Albert Edward Best was playing on the said wharf as alleged in the declaration that he was a trespasser and was guilty of contributory negligence and that this defendant owed no duty under the circumstances to the said plaintiff.

And as to each and every other allegation of fact in the said declaration, defendant avers that it has no knowledge or information thereof sufficient to form a belief, wherefore it can neither admit nor deny the same but in so far as the same may be material calls for strict proof thereof.

William W. Bride, Corporation Counsel, D. C.; R. E. Lynch, Assistant Corporation Counsel, D. C., Attorneys for Defendant.

[fol. 6] MEMORANDA

April 9, 1930.—Notice of trial, Note of Issue filed. Calendared.

April 6, 1932.—Jury sworn and verdict for defendant.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

JUDGMENT—April 12, 1932

Session resumed pursuant to adjournment, Hon. Jennings Bailey, Justice, presiding.

* * * * * * *

It appearing under rule of Court that judgment should now be entered on the verdict in this cause it is so ordered.

Wherefore it is considered that plaintiff take nothing by this action that defendant go hence without day, be for nothing held and recover of the plaintiffs its cost of defense to be taxed by the clerk and have execution thereof.

MEMORANDA

April 13, 1932.—Appeal noted. Cost Bond fixed at $100.00 or $50.00 cash in lieu thereof.

May 6, 1932.—Undertaking on appeal ($100) approved and filed.

Proposed Bill of Exceptions filed.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

ASSIGNMENTS OF ERROR—Filed May 6, 1932

* * * * * * *

Now comes the plaintiff by his attorney, John H. Burnett, Esq., and assigns for review to the Court of Appeals of the District of Columbia, on appeal in the above entitled cause, the following errors committed by the trial court:

(1) In Granting the motion of the defendant for a directed verdict upon the opening statement of the counsel for the plaintiff.

(2) In entering judgment on the verdict as returned by the jury.

James A. O'Shea, J. H. Burnett, Alfred Goldstein,
Attorneys for Plaintiff.

[fol. 7] Service of copy acknowledged this 6 day of May, 1932.

R. E. Lynch, Attorney for Defendant.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

ORDER SETTLING BILL OF EXCEPTIONS—May 18, 1932

Session resumed pursuant to adjournment, Hon. Jennings Bailey, Justice, presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record whereupon the bill of exceptions filed herein is duly submitted, signed and made of record nunc pro tunc the date of trial.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed May 6, 1932

* * * * * * *

The clerk of the court will include in the transcript of the record in the above entitled cause the following:

(1) Declaration.
(2) Defendant's Plea.
(3) Memo: Note of Issue and Order to Calendar.
(4) Verdict.
(5) Judgment and Exception Noted.
(6) Memo.: Appeal Noted and Bond Fixed.
(7) Memo.: Appeal Bond Filed and Approved.
(8) Memo.: Bill of Exceptions Submitted.
Memo.: Bill of Exceptions Settled and Signed.
(9) Bill of Exceptions.
(10) Assignments of Error.
(11) This Designation.

James A. O'Shea, J. H. Burnett, Alfred Goldstein,
Attorneys for Plaintiff.

Service of copy acknowledged this 6 day of May, 1932.

R. E. Lynch, Attorney for Defendant.

[fol. 8] Clerk's certificate to foregoing transcript omitted in printing.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

Law. No. 77860

NOAH BEST, Administrator of the Estate of Albert Edward Best, Plaintiff,

vs.

DISTRICT OF COLUMBIA, Defendant

Bill of Exceptions

Be it remembered that at the trial of this cause before Mr. Justice Jennings Bailey and a jury on April 6, 1932, John H. Burnett, Esquire, appearing for the plaintiff and Robert Lynch appearing for the defendant, the following proceedings were had:

That a jury was impaneled and sworn and thereupon an opening statement on behalf of the plaintiff was made as follows:

Mr. Burnett: "If the court please, and you ladies and gentlemen of the jury: as I indicated to you in identifying the [fol. 9] case, this is a case against the District of Columbia filed by Mr. Best as administrator for the estate of his son. The facts that we will show you, briefly, are these, that Mr. Best's son was a child of five years of age and that on the day in question he and other children were playing down at a wharf close to where the Norfolk boats leave for Norfolk, and this wharf was operated and controlled by the District of Columbia; that they had there on this wharf some boards which extended over the water and they had in the wharf, as several witnesses will testify, from ten to thirteen holes of various and varying sizes; that one of the holes was quite large, approximately 3 feet in diameter; that this place was not fenced off; that it did have some sort of a barrier close to the street. There was no sidewalk, but the side portion was down and that the children went in and out at their pleasure, and that this son of Mr. Best went in there on this morning and while in there fell through one of the holes in this wharf:

"That there was no one there at the time to keep the children away, and that the watchman who was stationed arrived some time after this occurrence; that the children used this place to play on and play in; and that the District having maintained it in a condition such that it was dangerous to the life and limb of these children it is responsible for the child having been attracted there, going in and falling through this hole. Of course the child died, having been drowned; and the damages that the plaintiff has suffered as representing the estate of the child will be determined by you in your verdict if you are convinced by a preponderance of the evidence that we have established our case.

"That this wharf is not part of the public highway but is on private property of the District of Columbia, and is not a place to which the public is admitted, but is a place where the boats dock and unload sand which is taken out and used by the District."

That thereafter counsel for the defendant moved the Court to direct a verdict for the defendant upon the opening statement as above set forth on the ground that no cause of action had been stated therein; that after argument thereupon said motion was granted and plaintiff excepted thereto; that thereupon the Court directed the jury to return a verdict for the defendant, which was accord-
[fol. 10] ingly done and plaintiff excepted thereto on the ground that a cause of action had been stated. Whereupon, the verdict for the defendant was entered and plaintiff excepted thereto on said ground stated.

Each and all of the exceptions stated in the foregoing bill of exceptions were duly noted by the court at the time the same were severally taken, and said exceptions are signed as the several exceptions taken at the trial of the above entitled cause this 18th day of May, 1932, nunc pro tunc.

Jennings Bailey, Justice.

Consented to.

John H. Burnett, Counsel for Plaintiff. R. E. Lynch, Counsel for Defendant.

[File endorsement omitted.]

Wednesday, May 3rd, A. D. 1933.

No. 5768

NOAH BEST, Administrator of the Estate of Albert Edward Best, Deceased, Appellant,

vs.

DISTRICT OF COLUMBIA, a Body Corporate for Municipal Purposes

The argument in the above entitled cause was commenced by Mr. J. H. Burnett, attorney for the appellant.

Thursday, May 4th, A. D. 1933.

No. 5768

NOAH BEST, Administrator of the Estate of Albert Edward Best, Deceased, Appellant,

vs.

DISTRICT OF COLUMBIA, a Body Corporate for Municipal Purposes

The argument in the above entitled cause was continued by Mr. J. H. Burnett, attorney for the appellant, and by Mr. R. E. Lynch, attorney for the appellee, and was concluded by Mr. J. H. Burnett, attorney for the appellant.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5768

NOAH BEST, Administrator of the Estate of Albert Edward Best, Deceased, Appellant,

v.

DISTRICT OF COLUMBIA, a Body Corporate for Municipal Purposes

Appeal from the Supreme Court of the District of Columbia

Argued May 3, 1933. Decided June 30, 1933

James A. O'Shea, John H. Burnett, and Alfred Goldstein, all of Washington, D. C., for appellant.

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William W. Bride, corporation counsel, and Robert E. Lynch, assistant corporation counsel, both of Washington, D. C., for appellee.

Before Martin, Chief Justice, and Van Orsdel, Hitz, and Groner, Associate Justices

MARTIN, Chief Justice:

An appeal from a directed verdict in an action for damages for negligence.

The plaintiff below, appellant here, is the administrator of Albert Edward Best, deceased, and as such administrator sued the District of Columbia for damages caused by the alleged neglect of the District in maintaining a certain wharf in a dangerous condition, thereby causing the death of plaintiff's decedent.

In the declaration the plaintiff alleged that the defendant maintained the wharf upon the river edge in the city of Washington, which was used by the District as a sand wharf; that the wharf was adjacent to a public street frequented by many people and children; that it was the duty of the defendant to properly guard the approaches to the wharf in order that it might not be peculiarly attractive to children of tender years; and to maintain and keep a proper lookout so that children of tender years would not be enticed to come onto the wharf and play on or about it; and maintain it in a reasonably safe condition with due regard to the safety of plaintiff's intestate, and not unnecessarily and unreasonably expose him to danger, and to maintain the wharf so that it would not be dangerous and unsafe. But plaintiff averred that the defendant in violation of its duties negligently failed to properly guard the approaches to the wharf in that there was no proper gate or guard upon it, and negligently failed to maintain a safe lookout for children of tender years playing in, on, and about said wharf, so as not to unreasonably and unnecessarily expose such children to danger, and negligently suffered it to remain in a dangerous condition, leaving large holes in the floor unguarded and unprotected; that defendant had full knowledge that the wharf was dangerous, but notwithstanding for a long period of time negligently allowed it to remain in the condition aforesaid, and made no effort to protect or guard children of tender

years from the dangerous condition thereof; that the plaintiff's intestate, a child five years old, lived with his parents in the vicinity of the wharf, and was incapable of exercising ordinary care and prudence in matters relating to a dangerous wharf, and on April 28, 1929, in company with other young children, was attracted to the wharf and while playing upon it, without any negligence on the part of plaintiff's intestate, fell through one of the holes in the wharf into the water beneath and was drowned.

The defendant by plea denied all charges of negligence on its part.

The case came on to be tried, and counsel for plaintiff made an opening statement to the court and jury in which he repeated in substance the allegations of the declaration, stating also that some of the boards of the wharf extended over the water and that there were from 10 to 13 holes of varying sizes in the boards; that one of the holes was approximately three feet in diameter; that the wharf had some sort of barrier close to the street; that there was a fence between it and the sidewalk but the side portion was down, and children went in and out at their pleasure; that plaintiff's decedent went upon the wharf on the morning in question and fell through one of the holes in the floor and was drowned; that there was no one there at the time to keep the children away, and that the watchman who was stationed there arrived some time after the occurrence; that the wharf is not a part of the public highway but is on private property of the District and is not a place to which the public is admitted, but is a place where the boats dock and unload sand which is taken out and used by the District.

At the cloes of this statement counsel for the defendant moved the court to direct a verdict for the defendant on the ground that no cause of action had been stated by plaintiff's counsel, the court sustained this motion and directed the jury to return a verdict for the defendant, which was done and judgment entered accordingly. This appeal was then taken.

We cannot commend the procedure adopted by counsel for the defendant in filing the motion for a directed verdict at the close of plaintiff's statement to the jury. The motion raises issues which could properly have been sub-

mitted by a motion to dismiss the petition for want of substance. Had such a motion been submitted in ordinary course, the trial justice would have been given time in which to consider it, and in case it was sustained the plaintiff might have desired and been given an opportunity to amend. The course pursued in this case resulted in the dismissal of the cause before any testimony was taken, and under circumstances equivalent to a surprise, such as made it difficult for the plaintiff to amend his pleading if such course seemed proper and desirable.

It is apparent, of course, that the plaintiff's cause of action herein is founded upon the "attractive nuisance" doctrine which has been the subject of much litigation and many discordant decisions.

In 20 Ruling Case Law, p. 79, it is said:

"But inasmuch as children are less able to foresee and appreciate danger than are persons of mature years and intelligence, it is generally recognized that they are entitled to a greater degree of care than adults; and this has been particularly emphasized in the class of cases dealing with injuries from what have been termed 'attractions to children' or 'attractive nuisances.' These decisions establish that while a proprietor may owe no duty to adults with respect to instrumentalities maintained by him, he may be liable for injuries to a child of tender years for injuries sustained from the same instrumentalities. The doctrine has been well stated in the following terms: 'One who maintains dangerous instrumentalities or appliances on his premises of a character likely to attract children in play, or permits dangerous conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement, is liable to a child non sui juris who is injured therefrom.'"

The decision of the Supreme Court of the Unifed States in Sioux City R. Co. v. Stout, 17 Wall. 657, is the pioneer authority in the establishment of the doctrine in this country. In that case a railroad company was held liable in an action by a child about six years old, who had injured his foot while playing with a turntable belonging to the company, notwithstanding the contention that he was a trespasser and that the company owed him no duty. It appeared that the turntable was located in an open space

on the private grounds of the company, about 30 rods from the company's depot, in a hamlet of from one hundred to one hundred and fifty persons. The turntable was not attended or guarded by any servant of the company, was not fastened or locked, and revolved easily on its axis, and a servant of the company had previously seen boys playing there and had forbidden them to do so.

It is said that this decision and several others that quickly followed it have given rise to an extraordinary controversy as to the merits of the "doctrine" established thereby and its relation to general theories of law. Many courts have given it their sanction and approval, while others have disapproved it. It is asserted that modern tendencies are toward a restriction rather than an extension of the principal thereby established. 20 R. C. L. 81.

In the case of Union Pacific Railway Company v. McDonald, 152 U. S. 262, a railway company which operated a coal mine near one of its stations in Colorado was in the habit of depositing the slack on an open lot between the mine and the station in such quantities that the slack took fire and was in a permanent state of combusion. This fact had been well known for a long time to the employees and servants of the company, but no fence was erected about the open lot, and no efforts were made to warn people of the danger. A lad 12 years of age and his mother arrived by train at the station and descended there. Neither had any knowledge of the condition of the slack, which, on its surface, presented no sign of danger. Something having alarmed the boy, he ran toward the slack, fell on and into it, and was badly burned. Suit was brought to recover damages from the railway company for the injuries thus inflicted upon him and it was held that the company was guilty of negligence and that the lad was not a trespasser, under the circumstances, and had not been guilty of contributory negligence.

In United Zinc and Chemical Company v. Britt, 258 U. S. 268, it appears that the defendant owned a tract of land on the outskirts of a town, on which was an open and abandoned cellar wherein water had accumulated, clear in appearance but dangerously poisoned with chemicals resulting from manufacturing operations formerly conducted there by the defendant. A traveled way passed within 120 feet of the pool and paths crossed the tract. Children came

upon the land, entered the water, were poisoned and died. Defendant knew the condition of the water; but the pool, if visible to the children without trespassing, was not proven to have caused their entry, nor were children in the habit of going to it. It was held that no license or invitation could be implied and that the defendant was not liable.

In the opinion of the court, delivered by Mr. Justice Holmes, comment was made upon the fact that judgment had been entered for the child by the Circuit Court of Appeals, largely upon the authority of the McDonald and Stout cases, supra, 264 Fed. 785. The opinion then proceeds with the following exposition:

"Union Pacific Ry. Co. v. McDonald, 152 U. S. 262, and kindred cases were relied upon as leading to the result, and perhaps there is language in that and in Railroad Co. v. Stout, 17 Wall. 657, that might seem to justify it; but the doctrine needs very careful statement not to make an unjust and impracticable requirement. If the children had been adults they would have had no case. They would have been trespassers and the owner of the land would have owed no duty to remove even hidden danger; it woud have been entitled to assume that they would obey the law and not trespass. The liability for spring guns and man-traps arises from the fact that the defendant has not rested on that assumption, but on the contrary has expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it. Chenery v. Fitchburg R. R. Co., 160 Mass. 211, 213. Infants have no greater right to go upon other peoples' land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. On the other hand, the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is cerain to attract them, has the legal effect of an invitation to them although not to an adult. But the principle if accepted must be very cautiously applied."

It is clear that the foregong decision serves sharply to define and limit the doctrine of "attractive nuisance" in the Federal courts. This statement is fully justified by the fact that three justices of the Supreme Court sitting in the case filed a dissenting opinion in which it is said that the decision overrules two decisions (obviously the Stout and McDonald cases, supra) which had been considered as leading authorities for half a century. In the present case therefore we accept the rule that a landowner owes no general duty to keep his land safe for children of tender years, or even free from hidden dangers, if he has not directly or by implication invited them there. New York, New Haven, and Hartford R. R. Co. v. Fruchter, 260 U. S. 141.

In relation to the "attractive nuisance" doctrine this court in Sullivan v. Huidekoper, 27 App. D. C. 154, held that there is no duty upon the part of a real-estate owner, upon whose land is an open and unfenced pond, to keep his land safe for a trespasser, even when such trespasser is a boy ten years old; the primary duty to guard and protect a child against patent and unconcealed dangers devolves upon the parent, and not upon the owner of land upon which the child is trespassing.

In Hageage v. District of Columbia, 42 App. D. C. 109, this court held that no inherent dangers within the doctrine of attractive nuisances, and no concealed dangers amounting to a nuisance, are involved in uneven, declivitous ground leading to the top of a high retaining wall, or in the fact that the wall is unguarded, so as to render the District of Columbia as owner of the ground liable where it has not designated the same as a public playground, for the death of a child caused by falling down the declivity and over the wall, while at play thereon in accordance with the custom of the children of the neighborhood.

In Branan v. Wimsatt, 54 App. D. C. 374, it was held that children who enter a lumber yard by implied permission stand in no better relation to the owner than that of mere licensees, to whom owner owed no duty other than that of not wilfully causing them harm, and of not exposing them to hidden perils which could not be avoided by exercising due care; and that the doctrine of "attractive nuisance" does not apply to children of such age as to know the risk they assume when they play in a lumber yard; that doctrine being inapplicable to property not per

se dangerous, or peculiarly alluring or attractive to children, and excluding minors who have reached the age of discretion, or who, knowing the hazard, assume the risk of doing that which will imperil their lives or limbs.

Upon a review of the foregoing decisions, particularly that in United Zinc Company v. Britt, we are convinced that the plaintiff in the present case has not shown a cause of action against the District of Columbia because of the death of plaintiff's decedent.

It appears from the declaration and the statement of counsel in opening the case that the wharf in question was not open to the public, nor a place where people would be likely to congregate; it was a workaday wharf where sand and gravel were unloaded and taken away for use in the District. The wharf was not frequented by people in general, and it contained nothing that was alluring or attractive to anybody, young or old, unless it can be said that every wharf, however barren, is per se alluring and attractive to children. The wharf was bordered on the land side by a public street and not by a sidewalk; there was a barrier between the street and the wharf, although it is said that part of this was down; there was a watchman in charge of the place, although at this particular time he was absent, arriving there some time after the occurrence. Children would themselves be a nuisance about such a place and would not consciously be tolerated there. If the doctrine of "attractive nuisance" be made to apply to such a situation, it is difficult to see how any owner could safely operate a wharf at any place along the water edge where children might mischievously or from curiosity or sport undertake to play near the water. It cannot be said that under these circumseances there was either directly or by implication a license or invitation extended to anybody, young or old, to go upon the wharf, except those persons having business there. This brings the present case within the doctrine of the Britt case and leads to the conclusion which we have reached that the doctrine of "attractive nuisance" does not apply.

The judgment of the lower court is therefore affirmed with costs.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5768

NOAH BEST, Administrator of the Estate of Albert Edward Best, Deceased, Appellant,

v.

DISTRICT OF COLUMBIA, a Body Corporate for Municipal Purposes, Appellee

GRONER, J., dissenting:

I regret I am unable to agree with the conclusion reached by the court in this case.

That the "turntable doctrine", or the "attractive nuisance doctrine", has been materially restricted by recent State court decisions I fully agree, and likewise I agree that, so far as the Federal courts are concerned, the effect of the Zinc Co. case (cited in the opinion of the majority) is to greatly modify the Stout and McDonald cases (also cited in the majority opinion), but I do not think that, giving the Zinc Co. case its broadest interpretation, it will support the non-suiting of the plaintiff here, as was done in the court below.

To maintain a wharf along the side of a public street and allow the fence separating it from the street to fall down from disrepair, and then to load it with sand and leave it unwatched and unattended, is, I think, to expose a bait which children will follow "as mechanically as a fish." I think the action of the court below should be reversed.

Friday, June 30th, A. D. 1933.

No. 5768, April Term 1933

NOAH BEST, Administrator of the Estate of Albert Edward Best, Deceased, Appellant,

vs.

DISTRICT OF COLUMBIA, a Body Corporate for Municipal Purposes

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel,

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On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be and the same is hereby, affirmed with costs.

June 30, 1933.

Per Mr. Chief Justice Martin.

Mr. Justice Groner dissenting.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Number 5768

NOAH BEST, Administrator, etc., Appellant,

vs.

DISTRICT OF COLUMBIA, Appellee

ORDER FOR TRANSCRIPT OF RECORD

Now comes Noah Best, appellant, by his attorneys and requests the clerk to prepare a Transcript of Record on writ of certiorari to the Supreme Court of the United States in the above entitled cause and include therein the following:

1. The printed Record in the Court of Appeals.
2. Minute entries as to argument in the case.
3. The Opinion.
4. The judgment.
5. This designation.

James A. O'Shea, John H. Burnett, Alfred Goldstein, 402 6th Street N. W., Attorneys for Appellant.

Service of copy acknowledged this 17th day of July, 1933.

R. E. Lynch.

[Endorsed:] Number 5768. Noah Best, administrator, etc., appellant, vs. District of Columbia, appellee. Order for transcript of record. James A. O'Shea, John H. Burnett, Alfred Goldstein, 402 6th Street N. W., Attorneys for Appellant. Court of Appeals, District of Columbia. Filed Jul. 17, 1933. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 22, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of Noah Best, Administrator of the Estate of Albert Edward Best, deceased, Appellant, vs. District of Columbia, a Body Corporate for Municipal Purposes, No. 5768, April Term, 1933, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 18th day of July, A. D. 1933.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

(3951)

[fol. 22] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed November 6, 1933

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,080. District of Columbia Court of Appeals. Term No. 477. Noah Best, administrator of the estate of Albert Edward Best, deceased, petitioner, vs. District of Columbia. Petition for a writ of certiorari and exhibit thereto. Filed September 23, 1933. No. 477, O. T., 1933.